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In The
Supreme Court of the United States

October Term, 1978

No.

78-558

JOHN F. KRETCHMAR,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

**BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEBRASKA**

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OPINION BELOW

The decision and opinion of the Supreme Court of Nebraska, issued on July 5, 1978, is reported at 201 Neb. 308, and is reprinted in the appendix to the petition herein.

JURISDICTION

The jurisdictional requisites, as recited in the petition, are accepted by the respondent.

QUESTION PRESENTED

Neb. Rev. Stat. § 60-435 (4) (Reissue 1974) authorizes members of the Nebraska State Patrol to stop any moving motor vehicle and require the driver thereof to exhibit his operator's license and the registration card issued for the vehicle. A Nebraska State Patrol officer, acting pursuant to that statute, stopped a motor vehicle being operated on a public highway. It is the testimony of the officer that his decision to spot-check that particular vehicle and driver was triggered by an intuitive or instinctive personal hunch, but without any probable cause or reasonable suspicion, that the vehicle might be stolen.

The federal question and sole issue is whether such conduct is violative of the Fourth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States and Neb. Rev. Stat. § 60-435 are correctly set forth in the petition.

STATEMENT OF THE CASE

The statement of the case contained in the petition is accepted, except for the intimation that the officer did not act pursuant to Neb. Rev. Stat. § 60-435. The officer's actions were done pursuant to the statute; although the circumstance which prompted the officer to exercise that authority was a purely subjective hunch that the vehicle might be stolen.

REASONS FOR DENYING THE WRIT OR DEFERRING ACTION THEREON

Subsequent to the filing of the petition herein, this Court granted certiorari in *State v. Prouse*, 382 A. 2d 1359 (Del. 1978); *cert. granted, Delaware v. Prouse*, No. 77-1571, Oct. 2, 1978. The pertinent facts and the question presented in both *Prouse* and the instant case are virtually identical. The State of Delaware does not appear to have a statute such as Neb. Rev. Stat. § 60-435, which expressly authorizes random stops of moving motor vehicles for the purpose of checking proper operator licensing and vehicle registration. However, in *Prouse* there appears to have been no question as to lack of state statutory authority for the random police stop there. Hence, this statutory distinction between the cases is insignificant for present purposes.

In *Prouse*, as here, the sole question is whether the random, non-systematic stopping of vehicles to check vehicle registration and operator's license, there being no

reasonable suspicion of any actual law violation, is constitutionally permissible. In *Prouse* the state court adopted the view that such random stopping of motor vehicles was inherently arbitrary and unconstitutional. In *Prouse*, of course, the state petitioned this Court for a writ of certiorari. Whereas, in the instant case the state court upheld the random stop procedure; and it is the convicted defendant Kretchmar who seeks the writ of certiorari here.

Under Rule 19(a), the granting of certiorari, in *Prouse* indicates either that the federal question has not been heretofore determined by this Court or that the state court decided the question in a way probably not in accord with applicable decisions of this Court. We tend to think that the latter was the case.

Contrary to the meaning which the petitioner ascribes to *United States v. Brignoni-Ponce*, 422 U. S. 873, 45 L. Ed. 2d 607, 95 S. Ct. 2574, we submit that decision quite unmistakably indicates the view of this Court to the effect that state and local enforcement agencies may lawfully conduct random limited stops, such as here, as a legitimate means of enforcing laws regarding drivers' licenses and vehicle registration, without doing violence to the Fourth Amendment. This is the correct interpretation of *Brignoni-Ponce*, as was enunciated by White, C. J., responding to dissents, in *State v. Kretchmar, supra*.

On the other hand, if it be the case that the grant of certiorari in *Prouse* indicates that the particular question raised there, and here, is not adequately answered by *Brignoni-Ponce*, then we would suggest that the Court

defer action on the petition here until a decision is reached in *Prouse*; such as was done in *Keney v. New York*, 388 U. S. 440, 18 L. Ed. 2d 1302, 87 S. Ct. 2091 (1967).

CONCLUSION

The reasons advanced in the petition here being not in accord with the decision of this Court in *Brignoni-Ponce*, the writ should be denied; or, in the alternative, action upon the petition should be deferred pending a decision of this Court in *Delaware v. Prouse*, No. 77-1571, *cert. granted*, Oct. 2, 1978.

Respectfully submitted,

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